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From: Brandt, Alf <Alf.Brandt@asm.ca.gov>
Sent: Wednesday, October 31, 2012 3:40 PM
To: McGowan, Jim@DGS
Cc: Nearman, Michael@DGS; Woonacott, Richard@SCSA; Day, Kevin@DGS
Subject: Opposition to Limits on Rainwater Capture
Attachments: California Law Allows Rainwater Capture.pdf

Jim,

As we discussed last week, I urge the California Building Standards Commission (CBSC) to AVOID any new limits on rainwater capture, such as limitation to rooftop collection. Such limits would be inconsistent with the efforts of Assemblyman Jose Solorio to pass his rainwater capture bills, including this year's AB 1750 that the Governor signed into law. AB 1750 reflects an affirmation – not a limitation – on rainwater capture.

The final AB 1750 amendments that passed into law were an attempt to eliminate any interference or limitation on the current CBSC process on Chapter 17 of the California Plumbing Code on rainwater. As you suggested, I have attached an explanation as to why existing law and AB 1750 authorize rainwater capture and do not impose any limitations on rainwater capture. Instead, the bill codifies a narrow finding of the State Water Resources Control Board.

I hope the CBSC will consider this material as they consider the final version of the new California Plumbing Code in December. Please let me know if you have any questions.

Sincerely,

Alf

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California Law Allows Rainwater Capture

AB 1750 Promotes – Does Not Limit – Rainwater Capture

Recent enactment of AB 1750 (Solorio), Chap. 537 of Stat. 2012, reflects the culmination of a 3-year effort to clarify – NOT change – California water rights law regarding rainwater capture. Beginning with the introduction of AB 1834 (Solorio) in 2010, Assemblyman Solorio framed his rainwater capture legislation as an effort to resolve ambiguities in state law. The legislation's final form codified an existing determination by the State Water Resources Control Board that rainwater off rooftops does not require a water right, but left intact existing law that allows rainwater capture more broadly.

Capturing Rainwater Does Not Require a Water Right Under Existing Law. Under California's law of appropriative and riparian water rights, diversion of water from a stream requires either ownership of land "riparian" to a stream or a right to beneficially use water from that stream on land further away. This law comes from both the Common Law and California statute. Specifically, California Water Code Section 1201 defines "public water" that is subject to appropriative water rights (and by reference to riparian rights):

1201. All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.

Therefore, water that has not yet entered a "natural channel" – such as rainwater before it enters a stream – is not public water requiring a water right.

AB 1750 Adopted Existing SWRCB Determination. After Senate Environmental Quality Committee (EQ) amended AB 1750 into a form that elicited intense opposition, Assemblyman Solorio deleted much of the bill. (Former bill supporters indicated they would fight the bill on the Senate floor if it proceeded with the EQ amendments.) EQ staff had objected to allowing rainwater used indoors unless the Department of Public Health approved, and the Committee followed the staff recommendation to require DPH "concurrence" before the California Building Standards Commission (CSBC) could adopt building standards for indoor water use. Deleting the authorization for use of rainwater eliminated EQ jurisdiction and its authority to object to the amendments. Assemblyman Solorio replaced the deleted language with a codification of a response by the State Water Resources Control Board (SWRCB) to a question on its website – as to whether rainwater capture was allowed. This replacement language intentionally eliminated any barriers to the CSBC adopting building standards for rainwater capture. The narrowness of this codification reflects the intent to stay out of the way of current CBSC process.

AB 1750 and SWRCB Affirm Right to Capture Rainwater in California. Neither the SWRCB's answer nor AB 1750's codification limits rainwater capture to rooftops. Instead, they affirm the right to capture rainwater that has not entered a "natural channel." The language references rooftops as a device that promotes public recognition. It does not include any language that would limit rainwater capture and the savings clauses in Section 10572 include an affirmation that the bill does not "[c]hange existing water rights law." The definition of "rainwater" applies only to the Water Code, not the Health and Safety Code under which CBSC acts. Allowing rainwater capture without a water right therefore remains the law of California. AB 1750 and the SWRCB determination are an affirmation, not a limitation, on water rights.